Supreme Court, U.S.
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No. 05-1074

IN THE

Supreme Court of the United States

LILLY M. LEDBETTER,

Petitioner,

v.

THE GOODYEAR TIRE & RUBBER COMPANY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

JAY ST. CLAIR
Counsel of Record
KELLY H. ESTES
SCOTT BURNETT SMITH
BRADLEY ARANT ROSE & WHITE LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, Alabama 35203
(205) 521-8000

Attorneys for Respondent

201423

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether a plaintiff asserting a disparate pay claim under Title VII against an employer that periodically reviewed and re-established her pay under a facially neutral compensation system may challenge pay decisions prior to the last decision immediately preceding the start of the statutory limitations period.

CORPORATE DISCLOSURE STATEMENT

The Goodyear Tire & Rubber Company, Inc. does not have a parent company. No publicly held company owns 10 percent or more of its stock.

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INTRODUCTION

The only employment "practices" that can form the basis of liability under Title VII are those that "occurred" within 180 days of an employee's EEOC charge. 42 U.S.C. § 2000e-5(e)(1). Despite this limitation, the district court below permitted Petitioner to challenge discrete salary decisions made at different times by different people over her nineteen-year career at Goodyear. Pet. App. 20a. The Eleventh Circuit reversed, holding that with respect to "this specie of disparate pay claims—that is, those in which the salary or pay level being challenged was periodically reviewed and re-established by the defendant-employer"—the employee "may reach outside the limitations period created by her EEOC charge no further tha[n] the last such decision immediately preceding the start of the limitations period." *Id.* at 14a.

The Court should deny the Petition for several reasons. *First*, the Eleventh Circuit did not decide the question framed by the Petition, and there is no circuit conflict on the question framed by the court of appeals. *Second*, even as to the question framed by the Petition, there is no conflict in the circuits. *Third*, the Eleventh Circuit's decision is entirely consonant with the decisions of this Court. *Fourth*, the Court need not reach the limitations question because Petitioner's claim fails on the merits. Thus, even if the Eleventh Circuit had decided the question framed by the Petition, and even if there were a circuit split on that question, this case would not be an appropriate vehicle for deciding it.

STATEMENT OF THE CASE

1. Petitioner worked at Goodyear's Gadsden, Alabama, tire plant for nineteen years as a Supervisor and later as an Area Manager. Pet. App. 5a. She was hired on February 5, 1979 (*id.*), and was initially paid the same salary as a similarly situated male employee. *Id.* at 12a. In 1980 and 1981, Petitioner received the same pay increase as all other Area Managers at the plant. Tr. 125–28. Beginning in 1982, Goodyear determined the salaries of its managerial employees using a system of annual merit-based raises. Pet. App. 4a. Raises were based on individual performance appraisals that incorporated an employee's performance ranking, present salary, and salary range. *Id.* Petitioner and her co-workers thus had their salaries reviewed at least once annually by plant management. *Id.* at 5a.

Petitioner worked in several different departments under several different supervisors before 1992. Pet. App. 5a. Earlier in her career, she was included in two general layoffs. *Id.* Her longest layoff started in 1986 and lasted into 1987. Tr. 128–30. She did not receive salary increases in 1986 or 1987 because of that layoff. *Id.* at 129–31. She was also included in another general layoff in 1989. *Id.* at 131–32.

At trial, Petitioner conceded that the manager who established her raises in 1990, 1991, and 1992 did not discriminate against her because of her sex. Tr. 132–33. She also offered no evidence of "who, prior to 1992, the other Area Managers in [her] immediate areas of the plant were, how [she] fared against them in end-of-year performance rankings, or how her salary or the merit-based raises she received compared to theirs." Pet. App. 5a.

From mid-1992 until 1996, Petitioner was supervised by Mike Tucker, who also supervised three male Area Managers. Pet. App. 5a. Based upon Tucker's recommendations, Petitioner received a 5.28 percent salary increase in 1993, a 5 percent increase in 1994, and a 7.85 percent increase in 1995. *Id.* at 6a. Petitioner's cumulative salary increase for this period was higher than the increases for all three of the male Area Managers working under Tucker's supervision. *Id.*; Tr. 134–36; DX 57.

Petitioner was ineligible for a salary increase in 1996 because her 1995 raise had not yet been in effect for the minimum time interval required between raises at that time. Pet. App. 7a. She was also ineligible for a raise in 1997 because she was slated to be included in an upcoming general layoff. *Id.* at 7a–8a. She did not receive a salary increase in 1998 because her manager at the time concluded that her performance did not warrant an increase. *Id.* at 9a.

In August 1998, Goodyear announced that it planned to downsize the Gadsden plant and offered an early retirement option. Pet. App. 9a. Petitioner applied and was accepted for early retirement, and she retired effective November 1, 1998. *Id.* Goodyear announced in February 1999 that the Gadsden plant was to close. *Id.* The plant never completely shut down, but large-scale layoffs and transfers occurred, reducing the number of Area Managers from sixteen to four. *Id.* at 9a–10a.

2. Petitioner filed suit on November 24, 1999, asserting various claims of employment discrimination. Pet. App. 10a & n.7. The district court submitted four claims to the jury, including Petitioner's disparate pay claim under Title VII.[1] The jury

1. Although the Petition states that Petitioner "sought backpay for the period beginning 180 days before she filed her EEOC charge" (Pet. 3), in fact she sought, and the district court awarded, backpay for a period beginning two years prior to her first EEOC filing. Pet. App. 41a; Doc. 76; Tr. 236; PX 207; PX 210; PX 211.

returned a verdict in Petitioner's favor only on the pay claim, ruling in Goodyear's favor on the remaining claims. After the district court denied Goodyear's renewed motion for judgment as a matter of law on the pay claim, Goodyear filed a timely appeal. *Id.* at 11a–12a.

3. The Eleventh Circuit reversed. The court expressly limited its decision to "this specie of disparate pay claims—that is, those in which the salary or pay level being challenged was periodically reviewed and re-established by the defendant-employer." Pet. App. 14a; *see also id.* at 23a–24a, 26a, 37a. In such a case, the court held that "an employee seeking to establish that his or her pay level was unlawfully depressed may look no further into the past than the last affirmative decision directly affecting the employee's pay immediately preceding the start of the limitations period." *Id.* at 24a. The court distinguished this case, where Petitioner's pay "had been reviewed and re-established over a dozen times," from cases in which employees do not have such "regular opportunities to complain of improperly deflated pay and to seek a raise." *Id.* at 26a. The court expressly declined to decide whether other courts faced with Title VII pay cases have read *Bazemore v. Friday*, 478 U.S. 385 (1986), too broadly. Pet. App. 27a. The court noted that it "remains an open question whether a disparate-pay plaintiff, in contrast to a pattern-and-practice pay plaintiff, should be able to challenge any decision made outside the limitations period." *Id.* The court of appeals stated: "We need not address that question today, however." *Id.*

The Eleventh Circuit then reviewed the sufficiency of the evidence supporting Petitioner's claim that she was denied pay increases in 1997 and 1998 because of her sex.

Pet. App. 27a–37a.[2] Petitioner's EEOC questionnaire and charge were both filed within 180 days of the 1998 decision, so there was no issue regarding the timeliness of that claim. On the merits, the court held that Petitioner "failed to produce a scintilla of evidence from which a reasonable jury could have found" that the 1998 decision was affected by her sex. *Id.* at 31a.

The Eleventh Circuit also examined the merits of Petitioner's claim concerning the decision not to give her a raise in 1997. The court did so even though the 1997 decision was made more than 180 days prior to Petitioner's first filing with the EEOC. Pet. App. 32a–37a. Again, the court of appeals held that "no reasonable factfinder could find the decision was motivated by [Petitioner's] sex." *Id.* at 36a–37a.

REASONS FOR DENYING THE PETITION

I. The Court Of Appeals Did Not Decide The Question Framed By The Petition.

The Petition asks this Court to decide "[w]hether and under what circumstances a plaintiff may bring an action under Title VII . . . alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay

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2. Petitioner incorrectly claims the Eleventh Circuit refused to consider evidence falling outside the limitations period as background evidence in support of a timely claim. Pet. 25. The court explicitly recognized the relevance of such evidence (Pet. App. 24a) but held, even considering this evidence, no reasonable jury could find that either the 1997 or 1998 pay decision was discriminatory. *Id.* at 31a & n.21, 34a & n.25, 35a & nn.26–27, 36a–37a.

decisions that occurred outside the limitations period." Pet. i. The Eleventh Circuit did not decide that question, however. Instead, it decided a different and much narrower question. As the Eleventh Circuit framed it, the issue was "how Title VII's timely-filing requirement applies to this specie of disparate pay claims—that is, those in which the salary or pay level being challenged was periodically reviewed and re-established by the defendant-employer." Pet. App. 14a. The court of appeals described the issue in those terms not once, as Petitioner asserts (Pet. 4 n.5), but at least four times. Pet. App. 2a ("The question we must decide . . . is how Title VII's timely-filing requirement applies in this specie of disparate pay cases—that is, cases involving an employer that annually reviews and re-establishes employee salary levels"); *id.* at 14a; *id.* at 23a–24a ("Limits on how far into the past the plaintiff can look for an intentionally discriminatory decision are most obviously warranted where, as here, the employee's pay level was subjected to periodic re-assessment through regularly-scheduled raise decisions."); *id.* at 26a (prior Eleventh Circuit decision "did not involve, as this case does, an employee whose pay had been reviewed and re-established over a dozen times."). There is no circuit split on the narrow question decided by the Eleventh Circuit, nor does Petitioner even suggest there is.

Petitioner in a footnote now quibbles with the Eleventh Circuit's framing of the question, claiming that her pay was not in fact "periodically reviewed and re-established" by Goodyear. Pet. 4 n.5. This is a factual argument that Petitioner did not raise in her rehearing petition below. Accordingly, neither the panel nor the full Eleventh Circuit had an opportunity to consider the argument she raises now for the

first time.[3] There can be no question that the precedential effect of the Eleventh Circuit's decision is limited to the issue framed and decided by the court. More important, the nature of Goodyear's annual pay raise system is a fact-bound issue that does not merit review by this Court.

Even as to the narrow question framed by the Eleventh Circuit, the court's holding was limited and qualified. The court held only "that in the search for an improperly motivated, affirmative decision directly affecting the employee's pay, the employee may reach outside the limitations period created by her EEOC charge no further tha[n] the last such decision immediately preceding the start of the limitations period." Pet. App. 14a. The court qualified its holding, stating, "We do not hold that an employee may reach back even that far; what we hold is that she may reach no further." *Id.*

In sum, the question framed by the Eleventh Circuit's opinion is different from and much narrower than the question framed by the Petition. The court's tentative and limited answer to the narrow question it framed does not

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3. Petitioner does not dispute that her pay was re-evaluated periodically, but apparently contends that the periodic reviews did not "re-establish" her pay because employees' salary rates carried over from the prior year and annual increases were subject to certain caps. Pet. 4 n.5. Yet as Petitioner herself acknowledges, the annual pay evaluations also included consideration of the employee's present salary and salary range. *Id. See also* Pet. App. 6a & n.3 (noting there was evidence at trial that Ledbetter received a substantial increase of 7.85 percent in 1995 because her supervisor "wanted to raise her salary and thought he could only do so significantly by giving her a 'top performance award'"). Moreover, pay increases could exceed annual caps. In fact, Petitioner's substantial increase in 1995 was well in excess of the annual "cap." *Id.* at 6a.

conflict with any decision of this Court or any other court of appeals. Petitioner does not even suggest the existence of a conflict on the question decided by the Eleventh Circuit that would warrant further review.

II. The Courts Of Appeals Are Not In Conflict Over The Question Presented.

Even if the Eleventh Circuit had actually decided the broad question framed by the Petition, its decision would not conflict with any decision of another court of appeals. This Court's recent decision in *National Railroad Passenger Corp. v. Morgan* resolved how to determine the timeliness of discrete discrimination claims as well as hostile environment claims under Title VII. 536 U.S. 101, 110–22 (2002). The Court decided *Morgan* just four Terms ago. Since then, less than half the circuits have issued published opinions applying *Morgan* to disparate pay claims. *See Forsyth v. Federation Employment & Guidance Serv.*, 409 F.3d 565, 572–74 (2nd Cir. 2005) (concluding that district court erred in finding *pro se* plaintiff's disparate pay claims untimely but affirming summary judgment for employer on the merits); *Shea v. Rice*, 409 F.3d 448, 451–56 (D.C. Cir. 2005) (reversing Rule 12(b)(6) dismissal of *pro se* plaintiff's Title VII pay claims as untimely); *Law v. Continental Airlines Corp.*, 399 F.3d 330, 332–34 (D.C. Cir. 2005) (affirming summary judgment holding ADEA pay claims were time-barred); *Reese v. Ice Cream Specialties*, 347 F.3d 1007, 1009–14 (7th Cir. 2003) (reversing summary judgment finding disparate pay claims untimely); *Hildebrandt v. Illinois Dept. of Natural Res.*, 347 F.3d 1014, 1025–29 (7th Cir. 2003) (remanding disparate pay claims under Title VII for further proceedings following trial of claims under Equal Pay Act);

Tademe v. St. Cloud State Univ., 328 F.3d 982, 989–90 (8th Cir. 2003) (assuming pay claims were timely but affirming summary judgment for employer on the merits). The decision below was the Eleventh Circuit's first published opinion applying *Morgan* outside the context of hostile environment claims. *See* Pet. App. 16a–19a.

Petitioner asserts that the Eleventh Circuit "acknowledged that its decision was in conflict with the post-*Morgan* decisions of other courts of appeals, including the Second and D.C. Circuits." Pet. 7 (citing Pet. App. 27a & n.19). Petitioner is incorrect. After discussing *Morgan* in the context of discrete pay discrimination claims, the Eleventh Circuit stated that *Morgan* "*may indicate*" that some courts have "read *Bazemore* too broadly." Pet. App. 27a (emphasis added). The court stated that "it therefore remains an open question whether a disparate-pay plaintiff . . . should be able to challenge any decision made outside the limitations period." *Id.* The court dropped a footnote with citations to other circuit cases—including the Second Circuit and D.C. Circuit decisions discussed in the Petition—that had reached this question. *Id.* at n.19. This explains why the footnote begins with the words "But see. . . ." *Id.* The Eleventh Circuit then stated, "*We need not address that question today, however.*" *Id.* at 27a (emphasis added). Thus, the Eleventh Circuit did not acknowledge a split with the Second and D.C. Circuits. It simply noted that other circuits had decided a limitations question that it chose to leave unresolved; the court opted instead to decide the case on the merits.

Moreover, the Second Circuit's decision in *Forsyth* and the D.C. Circuit's decision in *Shea* do not conflict with the decision below because the plaintiffs in both *Forsyth* and *Shea* challenged a facially discriminatory pay structure. The plaintiff in *Forsyth* alleged a discriminatory "salary structure" or "pay scale"

imposed when the defendant hired him as its first black employee in 1989. 409 F.3d at 567–68, 573. The record showed that the plaintiff's unequal pay was attributable to differences between him and other employees in their starting wage. *Id.* at 568. The district court granted summary judgment to the employer, finding the plaintiff's claims were untimely and that he had failed to establish a genuine issue of discrimination. *Id.* at 566–67. Petitioner incorrectly asserts that the Second Circuit reversed the judgment of the district court. Pet. 10 ("On appeal, the Second Circuit reversed."). In fact, the court affirmed. 409 F.3d at 573–74. *See id.* at 567 ("Although we affirm that judgment, we write to explain that plaintiff's claim for relief alleging salary discrimination was properly dismissed because Forsyth failed to establish genuine issues of triable fact with respect to it, and not because plaintiff's claim was time-barred as the district court believed."). The Second Circuit's discussion of the limitations question was thus unnecessary to its ultimate disposition of the case. Furthermore, *Forsyth*'s limitations discussion does not apply here because the plaintiff there, unlike Petitioner, was challenging "a discriminatory pay scale set up outside of the statutory period." *Id.* at 573.

Similarly, the plaintiff in *Shea* challenged a State Department diversity program that set his initial pay grade too low on account of his race and ethnicity. 409 F.3d at 449–50. In other words, he alleged that the State Department had adopted a two-tier wage structure that discriminated against white employees of Irish descent. *Id.* Moreover, the D.C. Circuit decided *Shea* on appeal from a dismissal under Federal Rule of Civil Procedure 12(b)(6). *Id.* The court emphasized that at that early stage of the litigation, dismissal was appropriate only if it appeared "beyond doubt" that the plaintiff could not prove a set of facts in support of his claim

which would entitle him to relief. *Id.* at 451. Even in the context of a motion to dismiss, the D.C. Circuit stated that discrete pay claims such as Petitioner's would be untimely:

> If Shea were complaining of the assignment of a discriminatorily low pay grade only, we would agree [his claim would be untimely] under a clear line of Supreme Court cases—*United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977), *Delaware State College v. Ricks*, 449 U.S. 250 (1980) and *Lorance v. AT&T Techs, Inc.*, 490 U.S. 900 (1989)—that bars claims where the relevant aspect of the employment system (such as a promotion, seniority, or termination) is facially neutral, and any discrete discriminatory conduct took place and ceased outside the period of limitations.

Id. (parallel citations, internal quotation, and citation omitted). It was only because the plaintiff's allegations went further to challenge "a persistent discriminatory salary structure" (*id.* at 453), as opposed to isolated decisions under a neutral salary system, that the court held he had pleaded an actionable claim:

> Shea's claim is *explicitly* premised on the existence of such a "discriminatory system." He alleged that he was hired at a lower pay grade and continues to receive discriminatory pay pursuant to the State Department's discriminatory diversity program.

Id. at 455.

Judge Williams concurred separately in *Shea* "to underscore the precise distinction that we draw . . . between cases where a plaintiff can recover for the current consequences of a discrete discriminatory act in a time-barred period and cases where he or she may not." *Id.* at 456 (Williams, J., concurring). In his opinion, "[t]he distinction turns . . . on whether one may reasonably characterize the defendant employer as applying a discriminatory *salary structure* in the unbarred period." *Id.* at 456 (emphasis added). Because the plaintiff had alleged a "two-class pay structure" rather than an "isolated act" arising in the time-barred period, Judge Williams agreed that the complaint could proceed. *Id.* at 458.

Forsyth and *Shea* are readily distinguishable from the Eleventh Circuit's decision. This case does not involve a facially discriminatory pay scale or salary structure, such as those challenged in *Forsyth* and *Shea*. Rather, Petitioner was hired at the same pay rate as a male comparator. Pet. App. 12a. Her claim is based upon isolated pay decisions made at different times by different decisionmakers under a facially neutral compensation program. *See* Pet. 4; Pet. App. 20a. Contrary to Petitioner's argument (Pet. 11–12), such claims would be untimely even under *Shea*. *See* 409 F.3d at 451. Similarly, the *Shea* plaintiff's claims would be timely under the Eleventh Circuit's opinion because he challenged only his initial wage assignment, not any intervening decision. *See* Pet. App. 25a–27a (explaining that, like *Shea*, the Eleventh Circuit's prior decision in *Calloway v. Partners National Health Plans*, 986 F.2d 446 (11th Cir. 1993), "belongs in a different category of pay-related cases and is fully consistent with the rule we announce today"). There is thus no circuit conflict even on the question framed by the Petition. To the extent there is any doctrinal disagreement

among the circuits over how *Morgan* applies to pay claims, that disagreement is narrow and immature and thus does not warrant review by this Court.

Furthermore, no other court of appeals has considered the Eleventh Circuit's suggestion "that in the search for an improperly motivated, affirmative decision directly affecting the employee's pay, the employee may reach outside the limitations period created by her EEOC charge no further tha[n] the last such decision immediately preceding the start of the limitations period." Pet. App. 14a. Indeed, the Eleventh Circuit itself did not definitively decide the question here, leaving that for another day. *Id.* ("We do not hold that an employee may reach back even that far; what we hold is that she may reach no further."). This Court should not grant certiorari to resolve that issue before it has been definitively decided by the Eleventh Circuit and considered by any other court of appeals.

III. The Eleventh Circuit's Decision Is Consistent With This Court's Precedent.

The Eleventh Circuit's decision is correct and supported by this Court's precedent. In applying Title VII's time limitations, this Court has consistently held that discrete acts of discrimination are actionable only if they are challenged in a timely EEOC charge. Absent such a charge, the Court has refused to allow the present effects of past actions to save an untimely claim. Petitioner's attempt to challenge every allegedly discriminatory decision made since 1979, when she was hired, based on the effects those decisions had on paychecks received within 180 days of March 25, 1998, when she filed her EEOC questionnaire, finds no support in this Court's Title VII jurisprudence.

In *Morgan*, the Court rejected the various "continuing violation" concepts the circuits had adopted to extend Title VII's time limitations. 536 U.S. at 107–08. It recognized that "[b]y choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination." *Id.* at 109 (internal quotation omitted). The Court therefore looked to Title VII's "statutory text," which provides that "[a] charge under this section *shall be filed* within one hundred and eighty days *after the alleged unlawful employment practice occurred*." *Id.* (quoting 42 U.S.C. § 2000e-5(e)(1)) (emphasis added by the Court). The critical questions, the Court observed, are: "What constitutes an 'unlawful employment practice' and when has that practice 'occurred.'" *Id.* at 110. The Court held that "[a] discrete retaliatory or discriminatory act 'occurred' on the day that it 'happened.'" *Id.* Because the employee sought to challenge discrete acts that occurred outside the charge filing period, the Court concluded his Title VII claims concerning those acts were "untimely filed and no longer actionable." *Id.* at 114–15. "While Morgan alleged that he suffered from numerous discriminatory and retaliatory acts from the date that he was hired through . . . the date that he was fired," the Court said "only incidents that took place within the timely filing period are actionable." *Id.* at 114.

Petitioner's theory that she should be able to challenge pay decisions made "at any point in the past" based solely on "paychecks received during the limitations period" (Pet. 9) is untenable after *Morgan*. The plaintiff in *Morgan* similarly argued that his employer's past acts constituted an "ongoing violation that can endure or recur over a period of time." 536 U.S. at 110. The Court rejected that argument. It looked instead to Title VII's definition of "unlawful

employment practices," which lists "numerous discrete acts" such as "to fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to his *compensation*, terms, conditions, or privileges of employment." *Id.* at 111 (quoting 42 U.S.C. § 2000e-2(a)) (emphasis added). Discrete acts such as these "are easy to identify" and must be made the subject of a timely charge to be actionable, the Court held. *Id.* at 114. In so holding, the Court explicitly rejected Petitioner's theory "that so long as one act falls within the charge filing period, discriminatory and retaliatory acts that are plausibly or sufficiently related to that act may also be considered for the purposes of liability." *Id.*

Morgan is only the most recent of this Court's decisions on point. In *United Air Lines, Inc. v. Evans*, the Court also held that the present effects of past acts of discrimination are not actionable without a timely charge. 431 U.S. 553, 558 (1977). Evans had been forced to resign because of United's policy against married female flight attendants. *Id.* at 554. Years later, after abandoning the policy, United rehired Evans but did not give her credit for her prior service. *Id.* at 555. This directly affected her rate of pay. *Id.* at 555 & n.5. Like Petitioner, Evans argued that because her pay was lower than it would have been but for the discriminatory acts years earlier, the seniority system gave "present effect to the past illegal act and therefore perpetuate[d] the consequences of forbidden discrimination." *Compare id.* at 557 *with* Pet. 4. Although the Court agreed that "United's seniority system does indeed have a continuing impact on her pay and fringe benefits," the Court held that Evans had failed to assert a timely claim. 431 U.S. at 558. As in *Morgan*, the Court observed that "the emphasis should not be placed on mere continuity; the critical question is whether any present

violation exists." *Id.* Because there was no present violation, the Court concluded "United was entitled to treat [the] past act as lawful after [she] failed to file a charge of discrimination" within the charge filing period. *Id.*

Similarly, in *Delaware State College v. Ricks*, the Court refused to apply a "continuing violation" theory to save a discrete employment decision from the limitations bar. 449 U.S. 250, 257 (1980). The Court observed that "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Id.* Ricks was a college professor who was denied tenure. *Id.* at 252. Rather than challenge the decision when it was made, Ricks waited almost a year to file his EEOC charge, near the end of his one-year terminal contract. *Id.* at 253–54. As in *Morgan*, the Court focused on when exactly the alleged "unlawful employment practice" occurred. *Id.* at 257. Distinguishing between the act's occurrence and its lingering effects, the Court observed that "the only alleged discrimination occurred—and the filing limitations periods therefore commenced—at the time the tenure decision was made and communicated to Ricks. That is so even though one of the *effects* of the denial of tenure—the eventual loss of a teaching position—did not occur until later." *Id.* at 258. The Court rejected Ricks's argument that his termination gave "present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination." *Id.* (internal quotation omitted). As in *Evans*, the Court stated "the proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." *Id.* (internal alterations, quotation, and citations omitted).

Petitioner tries to escape the holdings of *Morgan*, *Evans*, and *Ricks* by arguing that pay discrimination claims somehow require a different limitations analysis. Pet. 21–22 & n.15. Her support for this argument is a single sentence, taken out of context, from the Court's opinion in *Bazemore v. Friday*. Pet. 20–21. Despite Petitioner's claim that *Bazemore* "explained that the plaintiff's claim was timely" (Pet. 24), the issue presented in *Bazemore* was not a limitations question. Rather, it was whether Title VII applied to a facially discriminatory two-tier wage structure that had been in place since before Congress made Title VII applicable to public employers. 478 U.S. at 386–87, 394. Moreover, *Bazemore* did not involve past acts of discrimination that had present effects on a single employee's pay. Instead, the case was a pattern-or-practice case in which the United States alleged that Title VII required the employer to stop its admitted, ongoing practice of paying its black employees less than white employees because of their race. *Id.* at 391–95.[4] In those circumstances, the Court held,

> A *pattern or practice* that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that practice, it is liable under that statute.

Id. at 395 (emphasis added). It was in this context that the Court stated, "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable

4. The Court in *Morgan* reserved judgment on "the timely filing question with respect to 'pattern-or-practice' claims brought by private litigants." 536 U.S. at 115 n.9.

under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." *Id.*

Petitioner's reliance on *Bazemore* is thus misplaced. In *Bazemore* itself, the Court noted that *Evans* still applies where, as here, a neutral pay system merely carries forward the effects of past acts that a single employee failed to challenge in a timely matter. 478 U.S. at 396 n.6. *See also Evans*, 431 U.S. at 558. Because this is not a pattern-or-practice case, and Petitioner did not challenge Goodyear's annual pay review system as facially discriminatory, *Bazemore* is inapposite. *See Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 906–08, 912 n.5 (1989) (observing that *Evans* and *Ricks* foreclosed plaintiffs' argument that alleged Title VII violation occurred not only when their prior seniority "was eliminated but also when each of the concrete effects of that elimination was felt" and stating that a facially neutral system that has present effects is not equivalent to a facially discriminatory system, as in *Bazemore*, that "by definition discriminates each time it is applied"), *superseded by* 42 U.S.C. § 2000e-5(e)(2) "with respect to a seniority system that has been adopted for an intentionally discriminatory purpose."

Petitioner acknowledges that she is seeking to "reclaim" her Title VII rights. Pet. 23. But Title VII rights, like most statutory rights, are subject to statutes of limitations that are designed to prevent "revival of claims that have been allowed to slumber." *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348–49 (1944). "The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Id.* at 349. As the

Court held in *Evans*, Title VII affords no rights to a plaintiff who does not file a timely charge of discrimination. 431 U.S. at 558. Petitioner refuses to accept the basic point, recognized in *Ricks*, that Title VII's "limitations periods, while guaranteeing the protection of the civil rights law, also protect employers from the burden of defending claims arising from employment decisions that are long past." *Ricks*, 449 U.S. at 256–57. Under Petitioner's theory, she should have been allowed to hold Goodyear liable for any disparity reflected in her 1998 paychecks, even if that disparity was "caused by decision[s] made years earlier." Pet. 8. Yet this would allow employees to wait as long as possible—after decisionmakers had retired or died, documents had been lost or discarded,[5] and witnesses' memories had faded—before challenging isolated decisions made over the course of their career. *Order of Railroad Telegraphers*, 321 U.S. at 348–49. As the Court observed in *Morgan*, Congress adopted "quite short deadlines" in Title VII to protect employers against such stale claims. 536 U.S. at 109 (internal quotation omitted). *See* Pet. App. 23a.

IV. This Case Does Not Provide A Good Vehicle For Deciding The Limitations Question Because Petitioner's Claim Fails On The Merits.

Even if the Eleventh Circuit had decided the statute of limitations question framed by the Petition, and even if there were a real and mature circuit conflict on that question, this case would not be a good vehicle for resolving that conflict.

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5. The applicable EEOC regulation only requires an employer to preserve "records having to do with . . . rates of pay or other terms of compensation . . . for a period of *one year* from the date of the making of the record or the personnel action involved, whichever occurs later." 29 C.F.R. § 1602.14 (emphasis added).

This is so because the court decided the core of Petitioner's case—the 1997 and 1998 pay decisions—based on the sufficiency of the evidence presented at trial. *See* Pet. App. 27a–37a. Petitioner glosses over the latter portion of the court's opinion, which applied the doctrine established in *McDonald Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), to the record evidence. *See* Pet. 7–8. The Eleventh Circuit's decision on the merits rests on the application of settled doctrine to fact-bound issues following a jury trial.

Although the Eleventh Circuit did not make a definitive holding on the merits of salary decisions made prior to 1997, it is clear from its opinion and the trial record that no reasonable jury could have found intentional sex discrimination even in those years. For example, Petitioner was not eligible for a raise in 1996 (Pet. App. 7a), so she has no claim for that year. In addition, the manager who reviewed Petitioner's pay in 1995, 1994, and 1993 recommended that she receive higher cumulative pay raises over that period than any of the male Area Managers he supervised. Pet. App. 5a–6a; DX 57.[6] And Petitioner conceded at trial that the manager who determined her raises in 1992, 1991, and 1990 had no discriminatory animus. Tr. 132–33. Petitioner thus failed to produce sufficient evidence at trial showing any discriminatory decision from 1990 through 1996.

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6. Although Defendant's Exhibit 57 shows one male employee, Dick Jones, had a higher cumulative pay raise for this period, Petitioner admitted at trial that Jones was not similarly situated to her. Tr. 134–36.

The Eleventh Circuit recognized that Petitioner also failed to produce sufficient evidence to support her claims for the period prior to 1992:

> The record does not disclose who, prior to 1992, the other Area Managers in Ledbetter's immediate areas of the plant were, how Ledbetter fared against them in end-of-year performance rankings, or how her salary or the merit-based raises she received compared to theirs.

Pet. App. 5a. Petitioner thus failed to prove even the most basic elements of a pay discrimination claim for the years prior to 1992. *Id.*

At trial, Petitioner offered only bits of anecdotal evidence, such as two isolated sexist comments by a plant manager or her testimony that a non-managerial employee admitted to her that he manipulated some of her performance data.[7] Petitioner discusses this anecdotal evidence (*see* Pet. 3–4), but she fails to acknowledge that the Eleventh Circuit found this evidence had no probative value. The court described her testimony of sexist comments supposedly made by a plant manager as "hearsay upon hearsay."[8] Pet. App. 35a & n.27. Moreover, Petitioner did not prove when these statements supposedly were made, or whether the speaker played any role in setting her salary. *Id.* at 35a–36a. For these reasons the court concluded that this testimony was not sufficient to support an inference of discrimination. *Id.* at 36a–37a. The court also found that

7. The person whom Petitioner claims made this admission could not rebut her testimony at trial because he was dead. Tr. 147.

8. Goodyear objected to this hearsay testimony, but the district court overruled the objection. Pet. App. 35a & n.27.

Petitioner's evidence concerning falsified data had no probative value because it was relevant only to the accuracy of her manager's independent performance rankings, not to his intent. The court explained, "It is not discriminatory to honestly rely on inaccurate information, and there was no evidence that [Petitioner's manager at the time] acted any way but in good faith reliance on the information he was using." *Id.* at 31a-32a & n.21 (citations omitted).

This case is thus not an appropriate vehicle for deciding the broad timeliness question framed by the Petition. It is apparent from the Eleventh Circuit's opinion and the trial record that Petitioner failed to adduce sufficient evidence to prevail on her pay discrimination claim at any time during her career. Deciding the question presented will not change the outcome of this case.

CONCLUSION

For these reasons, the Court should deny the Petition.

Respectfully submitted,

JAY ST. CLAIR
Counsel of Record

KELLY H. ESTES
SCOTT BURNETT SMITH
BRADLEY ARANT ROSE & WHITE LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, Alabama 35203
(205) 521-8000

Attorneys for Respondent